

1 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
2 DANA ALDEN FOX, SB# 119761
3 E-Mail: Dana.Fox@lewisbrisbois.com
4 TONY M. SAIN, SB# 251626
5 E-Mail: Tony.Sain@lewisbrisbois.com
6 TORI L. N. BAKKEN, SB# 329069
7 E-Mail: Tori.Bakken@lewisbrisbois.com
8 ABIGAIL J. R. McLAUGHLIN, SB# 313208
9 E-Mail: Abigail.McLaughlin@lewisbrisbois.com
10 633 West 5th Street, Suite 4000
11 Los Angeles, California 90071
12 Telephone: 213.250.1800
13 Facsimile: 213.250.7900

14 Attorneys for Defendants,
15 CITY OF ANAHEIM, JORGE
16 CISNEROS, PAUL DELGADO, BRETT
17 HEITMAN, KENNETH WEBER, and
18 CAITLIN PANOV

19
20 **UNITED STATES DISTRICT COURT**
21 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

22
23 ANTONIO LOPEZ, individually;
24 JOHANNA LOPEZ, individually; M.R.,
25 by and through his guardian ad litem,
April Rodriguez, individually and as
successor in interest to Brandon Lopez;
B.L. and J.L., by and through their
guardian ad litem Rachel Perez,
individually and as successor in interest
to Brandon Lopez; S.L., by and through
his guardian ad litem, Rocio Flores,
individually and as successor in interest
to Brandon Lopez,

26 Plaintiffs,

27 vs.

28 CITY OF ANAHEIM; CITY OF
SANTA ANA; DAVID VALENTIN;
JORGE CISNEROS; PAUL
DELGADO; BRETT HEITMAN;
KENNETH WEBER; CAITLIN
PANOV; DOES 1-10,

29 Defendants.

30 Case No. 8:22-cv-1351-JVS-ADS
31 [Hon. James V. Selna, Dist. Judge; Hon.
32 Autumn D. Spaeth, M. Judge]

33
34 **DEFENDANTS' OPPOSITION TO**
35 **PLAINTIFFS' EX PARTE MOTION**
36 **TO MODIFY THE SCHEDULING**
37 **ORDER**

38 *Filed Concurrently with Declaration of
39 Abigail J.R. McLaughlin & Exhibits*

40 Complaint Filed: 05/07/2022
41 Fact DCO: 05/10/2024
42 Trial Date: 09/17/2024

1 **TABLE OF CONTENTS**

2 **Page**

3 1.	INTRODUCTION & SUMMARY OF OPPOSITION	1
4 2.	RELEVANT FACTUAL AND PROCEDURAL HISTORY.	2
5 3.	PLAINTIFFS FAIL TO DEMONSTRATE THE NECESSARY DILIGENCE TO SUPPORT THEIR REQUEST FOR MODIFICATION OF THE SCHEDULING ORDER.	4
7 4.	PLAINTIFFS' REQUEST FOR CONTINUANCE OF THE CASE MANAGEMENT DEADLINES AND TRIAL IN THIS MATTER IS PREMATURE & LACKS GOOD CAUSE.	7
9 5.	CONCLUSION.	8

1 **1. INTRODUCTION & SUMMARY OF OPPOSITION.**

2 Defendants CITY OF ANAHEIM, JORGE CISNEROS, PAUL DELGADO,
 3 BRETT HEITMAN, KENNETH WEBER, and CAITLIN PANOV (collectively
 4 “Defendants”) respectfully oppose Plaintiffs ANTIONIO LOPEZ and JOHANNA
 5 LOPEZ’s¹ (collectively “Plaintiffs”) *Ex Parte* Motion to Modify the Scheduling
 6 Order for the followings reasons.

7 First, Plaintiffs have failed to show that they were diligent in attempting to
 8 comply with this Court’s case management deadlines in this matter. Rather, Plaintiffs
 9 did not notice (or even communicate with Defendants regarding) the individual
 10 defendants’ depositions, which Plaintiffs cite as a basis for the need for a continuance.
 11 Additionally, Plaintiffs failed to show that they were diligent in seeking amendment
 12 of this Court’s scheduling order once it became apparent Plaintiffs could not comply
 13 with the order. Rather, Plaintiffs waited until less than a month prior to the fact
 14 discovery cut-off in this matter to meet and confer with Defendants about a
 15 continuance of all case management deadlines in this matter and during a time where
 16 the Parties’ counsel were all currently in a weeks-long trial in another matter (with
 17 some of Plaintiffs’ counsel), which ran from April 16, 2024 to April 30, 2024.

18 Second, Plaintiffs’ request for a continuance of all case management deadlines
 19 and trial in this matter is premature and lacks good cause because the Parties are
 20 scheduled to go to mediation on May 14, 2024. If the Parties settle this matter, there
 21 is no need for Plaintiffs’ requested relief. Moreover, if the Parties cannot reach an
 22 agreement regarding settlement, Defendants have repeatedly advised Plaintiffs that
 23 we are willing to revisit a stipulation for continuance if a good-faith mediation fails
 24 to resolve the case. But, Defendants are unwilling to agree to a stipulation to

25
 26
 27 ¹ The subject *Ex Parte* Motion was also filed on behalf of Plaintiff S.L., however
 28 S.L. has already settled their claims in this action with Defendants and S.L.’s *ex parte*
 petition to approve minor’s compromise was approved on May 7, 2024. [Dkt. 115.]

1 continuance *before* the May 14, 2024 mediation: as Defendants are entitled to a good-
 2 faith mediation attempt to resolve this case, and Plaintiffs' presumption of failure and
 3 the necessity of a continuance runs contrary to the goal of good faith in settlement
 4 negotiations – particularly after Plaintiffs previously cancelled a prior mediation after
 5 5:00 p.m. the day prior to the mediation.

6 **2. RELEVANT FACTUAL AND PROCEDURAL HISTORY.**

7 On January 18, 2024, this Court granted Defendants' Motion to Continue Case
 8 Management Deadlines in this matter by approximately three months, citing
 9 Defendants' demonstration of diligence in pursuing some discovery and filing the
 10 Motion, as well as: (1) defense counsel's unavailability for the May 14, 2024 trial
 11 date; (2) the additional time needed to depose the individual defendants in this matter;
 12 and (3) to allow for another mediation between the parties and a possible settlement.
 13 [Dkt. 110.]²

14 Defendants will have completed their fact discovery in this matter by the
 15 current May 10, 2024 discovery cut-off, as Defendants took the deposition of Plaintiff
 16 Antonio Lopez on January 15, 2024; served written discovery on Plaintiffs on March
 17 4, 2024, and received responses to the same on April 29, 2024; and will be taking
 18 Plaintiff Johanna Lopez's deposition on May 8, 2024. [McLaughlin Decl., ¶2.]

19

20 ² It is worth noting here that, before current defense counsel substituted into the
 21 case, a global settlement involving *all* of the plaintiffs (including the parent plaintiffs)
 22 appeared to be within reach. However, despite repeated requests, the parent plaintiffs
 23 have still failed to provide any numerical counteroffer to the Anaheim Defendants'
 24 last settlement offer. [See McLaughlin Decl., ¶5, Exh. B at p. 1.] Defendants are thus
 25 understandably skeptical of the parent plaintiffs' interest in and commitment to a
 26 good-faith settlement of this case: particularly when their counsel has not yet
 27 confirmed that the parent plaintiffs themselves will be attending the scheduled May
 28 14 mediation with mediator (Ret.) Judge Biderman; and particularly when, rather than
 focus upon laying sufficient groundwork for a productive settlement at the upcoming
 mediation, and possible complete resolution of the dispute, the parent plaintiffs are
 instead focused upon the instant *ex parte* and the (untimely) "need" for further
 discovery that would only be relevant/necessary if the May 14 mediation failed.

1 Notably, even after the discovery deadlines were extended, neither the settling
 2 plaintiffs nor the parent plaintiffs noticed any of the depositions of the shooting-
 3 involved Anaheim officers. [*Id.* at ¶3.]

4 Significantly, on or about March 27, 2024, the Parties (the parent plaintiffs and
 5 the Anaheim Defendants) agreed to participate in a second mediation in this matter
 6 before the Hon. Joseph Biderman on April 2, 2024 beginning at 10:00 a.m. [*Id.* at
 7 ¶4.] However, after previously confirming that such mediation would proceed, on
 8 April 1, 2024 at 5:04 p.m. (less than 24 hours prior), Plaintiffs' counsel informed both
 9 Defendants and Judge Biderman that they were "recently informed of a new conflict
 10 that one of our clients has with the scheduled mediation for tomorrow and therefore
 11 [are] not available to proceed with the mediation session." [*Id.*, Exh. A at p. 1.]

12 Though Plaintiffs remained open to a second mediation, they did not reach out
 13 about alternative dates until Defendants informed Plaintiffs that they would not agree
 14 to any continuances of the case management deadlines and trial date in this matter
 15 unless and until the mediation has been rescheduled and completed. [*Id.*, ¶5, Exh. B
 16 at pp. 7-12.] Notably, Defendants made a pre-mediation offer to Plaintiffs prior to
 17 the April 2, 2024 mediation, but never received a counter offer. [Exh. B at p. 1.]
 18 While the Parties currently intend to participate in mediation with Judge Biderman on
 19 May 14, 2024, due to Plaintiffs' prior last-minute cancellation of the earlier mediation,
 20 Defendants remain concerned that Plaintiffs will not attend the May 14, 2024
 21 mediation, or will not proceed in good faith to try to resolve this issue: particularly
 22 when, given the challenges for the parent plaintiffs to assert the claims that survived
 23 the other plaintiffs' settlement, the parent plaintiffs' remaining claims appear to be of
 24 lesser value than the settling plaintiffs. Thus, Defendants have repeatedly told
 25 Plaintiffs that they are unwilling to stipulate to any continuance in this matter until
 26 after the completion of a good-faith mediation as scheduled on May 14, 2024. [See
 27 generally Exh. B, C.]

1 On May 7, 2024, Plaintiffs informed Defendants of their intention to bring the
 2 subject *Ex Parte* Motion to Modify Scheduling Order via phone. [McLaughlin Decl.,
 3 ¶6.] However, in violation of C.D. Cal. Local Rule 7-19.1, Plaintiffs did not inform
 4 Defendants of the date they planned to file their *ex parte*. [Id.] Additionally, in
 5 violation of C.D. Cal. Local Rule 7-19, Plaintiffs' *Ex Parte* Motion does not contain
 6 the correct address or phone number for Defendant's counsel. [Id.; *see* Dkt. 117 at
 7 4:16-17.] Further, in violation of this Court's policies and procedures, Plaintiffs failed
 8 to inform Defendants that any opposition to their *ex parte* is required to be filed not
 9 later than 24 hours after the filing and service of the *ex parte*. [McLaughlin Decl., ¶6;
 10 <https://www.cacd.uscourts.gov/honorable-james-v-selna> ("The moving party . . .
 11 *shall* notify the opposing party that any opposition must be filed not later than 24
 12 hours after such service has been completed.") (emphasis added).]

13 Fortunately, Defendants are familiar with this Court's procedures, allowing
 14 them to timely file this Opposition.

15 **3. PLAINTIFFS FAIL TO DEMONSTRATE THE NECESSARY
 16 DILIGENCE TO SUPPORT THEIR REQUEST FOR MODIFICATION
 17 OF THE SCHEDULING ORDER.**

18 "[D]istrict judges have broad discretion to manage discovery and to control the
 19 course of litigation under Federal Rule of Civil Procedure 16." *Avila v. Willits Env't
 20 Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011). In general, the pretrial
 21 scheduling order can only be modified "upon a showing of good cause." *Zivkovic S.
 22 Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2022) (quoting *Johnson v. Mammoth
 23 Recreations, Inc.*, 975 F.2d 604, 608 (9th Cir. 1992)); *accord* Fed. R. Civ. P. 16(b)(4).
 24 "The pretrial schedule may be modified 'if it cannot reasonably be met despite the
 25 diligence of the party seeking the extension,'" but "[i]f the party seeking the
 26 modification 'was not diligent, the inquiry should end' and the motion to modify
 27 should not be granted." *Zivkovic*, 302 F.3d at 1087 (quoting *Johnson*, 975 F.3d at
 28 609); *see also Eckert Cold Storage, Inc. v. Behl*, 943 F. Supp. 1230, 1233 (E.D. Cal.

1 1996) (holding that “the focus of the Rule 16 ‘good cause’ inquiry is on the moving
 2 party’s diligence, or lack thereof, in seeking amendment”).

3 Accordingly, to demonstrate diligence, the moving party is required to show:
 4 (1) that it was diligent in assisting the Court in creating a workable Rule 16 scheduling
 5 order; (2) that its noncompliance with the scheduling order’s deadline occurred or will
 6 occur notwithstanding diligent efforts to comply because of “the development of
 7 matters which could not have been reasonably foreseen or anticipated at the time of
 8 the Rule 16 scheduling conference;” and (3) that it was diligent in seeking amendment
 9 of the scheduling order once it became apparent it could not comply with the order.

10 *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999).

11 **Here, Plaintiffs have demonstrated an utter lack of diligence in pursuing**
 12 **discovery in this matter** despite the current May 10, 2024 fact discovery cut-off.
 13 Plaintiffs state that they have “been diligently pursuing discovery in this case,”
 14 including “propound[ing] significant written discovery.” [Dkt. 117 at 6:26-7:1.] Yet,
 15 Plaintiffs’ last written discovery to Defendants was served on November 17, 2023,
 16 prior to the Court’s Order extending the case management deadlines in this matter per
 17 Defendants’ request. Additionally, Plaintiffs have utterly failed to notice or
 18 communicate with Defendants about the depositions of the individual defendant
 19 officers in this matter, despite being on notice of the approaching May 10, 2024 fact
 20 discovery cut-off; this is especially true given the Defendants’ scheduling of Plaintiff
 21 Johanna Lopez’s deposition on May 8, 2024. [See McLaughlin Decl., ¶¶3, 7, Exh. D.]

22 Moreover, Plaintiffs’ counsel were aware of both Parties’ counsel’s trial
 23 conflict from April 16, 2024 to April 30, 2024 (for the *Nunis* trial involving most of
 24 the same counsel) since on or about July 13, 2023. [McLaughlin Decl., ¶8.] Thus,
 25 when the Court granted Defendants’ request for continuance on January 18, 2024,
 26 Plaintiffs’ counsel, like Defendants’ counsel, were well-aware of the immovable
 27 scheduling conflict created by this trial (*Nunis*) and could have reached out about the
 28

1 individual defendants' depositions at any point in the approximately three (3) months
 2 preceding that conflict; and yet, Plaintiffs did not do so. [See *id.*, ¶3.]

3 Additionally, Plaintiffs attempt to blame Defendants for their need to bring the
 4 subject *ex parte*. However, it is clear that it is Plaintiffs' own lack of diligence that is
 5 to blame. Plaintiffs claim that they sought a stipulation to continue the case
 6 management deadlines in this matter to avoid the additional costs of depositions and
 7 retaining experts. Yet, as stated above, Defendants have completed their fact
 8 discovery in this matter and the Parties' expert disclosures are not due until after the
 9 May 14, 2024 mediation. Thus, if the Parties come to a settlement on May 14, the
 10 need for *any* discovery would be mooted. Additionally, as stated by Defendants, once
 11 mediation occurs, Defendants are willing to revisit a continuance of case management
 12 deadlines in this matter, which would necessarily include the expert disclosure
 13 deadline. [See Dkt. 110 (setting initial disclosure of experts as "not later than May
 14 17, 2024").]

15 Significantly, Plaintiffs' lack of diligence also applies to Plaintiffs' last-minute
 16 *ex parte* regarding this matter. Plaintiffs attempt to blame Defendants for a change in
 17 position. Yet, Defendants repeatedly told Plaintiffs their concerns about any
 18 continuance in light of the lack of re-scheduling the second mediation in this matter.
 19 [See generally Exh. B, C.] Furthermore, Plaintiffs waited until the Parties' trial
 20 counsel were in the middle of another trial (*Nunis*) to request that Defendants stipulate
 21 to a continuance. [See Dkt. 117 at 1:22-2:8.] As discussed above, Plaintiffs' counsel
 22 knew that the Parties' counsel was in trial (Mr. Sain, Ms. Bakken, Mr. Lacy, Ms.
 23 Andrews, and Ms. Quesada were all in trial together in San Diego for about 3 weeks)
 24 and Plaintiffs could have reached out about a continuance and/or filed the appropriate
 25 motion to obtain the continuance Plaintiffs now desire at a time that did not conflict
 26 with that other matter (*Nunis*); and yet Plaintiffs did not do so. Instead, Plaintiffs
 27 waited until three (3) days before the fact discovery cut-off in this matter to seek such
 28 a continuance.

1 Accordingly, Plaintiffs' alleged need to continue the case management
 2 deadlines in this matter is created solely through their lack of diligence; and thus the
 3 Court should deny Plaintiffs' *ex parte* in its entirety for lack of diligence/good cause.

4 **4. PLAINTIFFS' REQUEST FOR CONTINUANCE OF THE CASE
 5 MANAGEMENT DEADLINES AND TRIAL IN THIS MATTER IS
 6 PREMATURE & LACKS GOOD CAUSE.**

7 As stated above, the Parties are scheduled to attend mediation in this matter on
 8 May 14, 2024. Due to Plaintiffs' prior last-minute cancellation of mediation,
 9 Defendants are rightfully concerned about Plaintiffs repeating this same evasion of
 10 good-faith settlement after obtaining their requested continuance of all case
 11 management deadlines and the trial date in this matter. If Defendants stipulated to
 12 Plaintiffs' requested continuance prior to the Parties completing in good faith the May
 13 14, 2024 mediation and then Plaintiffs again cancelled such mediation, such
 14 stipulation would effectively reward Plaintiffs for their lack of diligence in discovery
 15 in this matter while providing no benefit to Defendants; who, as discussed, are in
 16 compliance with the Court's current case management deadlines.

17 If the Parties are able to reach a settlement on May 14, then Plaintiffs' request
 18 for continuance of the case management deadlines in this matter is mooted. If the
 19 Parties are not able to reach a settlement, Defendants are willing to revisit a stipulation
 20 for a continuance of all case management deadlines and trial in this matter in that
 21 unlikely event. As a result, there is no prejudice to Plaintiffs if the subject *ex parte*
 22 is denied. Plaintiffs' purported "urgency" is of their own making and there is thus no
 23 good cause basis for the Court to grant the extraordinary relief requested at this time.

24 Indeed, the moving plaintiffs utterly fail to show why their requested relief
 25 would result in undue prejudice absent hearing shorter than a noticed motion. Surely,
 26 if the May 14 mediation fails, Plaintiffs could then bring a regularly-noticed motion
 27 seeking leave to "reopen" discovery and push out all of the related deadlines. When
 28 mediation on May 14 may very well completely resolve the case – assuming the

1 parent plaintiffs are in attendance and all parties enter such mediation in a good faith
2 attempt to resolve the dispute – Plaintiffs cannot establish the requisite good cause,
3 and/or irreparable prejudice, which is a threshold requirement for establishing the
4 necessity of *ex parte* relief. *Cervantes v. Zimmerman*, 2020 U.S. Dist. LEXIS 1498
5 at *3 (S.D. Cal., Jan. 6, 2020) (citing *in re Intermagnetics America, Inc.*, 101 B.R.
6 191, 193 (C.D. Cal. 1989)).

7 For the foregoing reasons, Plaintiffs' *ex parte* should be denied for lack of good
8 cause.

9 **5. CONCLUSION.**

10 Based on the foregoing, Defendants respectfully request that Plaintiffs' *Ex*
11 *Parte* Motion to Modify the Scheduling Order be denied *in its entirety*.

12 DATED: May 7, 2024

LEWIS BRISBOIS BISGAARD & SMITH LLP

13 By: /s/ Abigail J.R. McLaughlin

14 DANA ALDEN FOX

15 TONY M. SAIN

16 TORI L. N. BAKKEN

17 ABIGAIL J. R. McLAUGHLIN

18 Attorneys for Defendants,

19 CITY OF ANAHEIM, JORGE

20 CISNEROS, PAUL DELGADO, BRETT

21 HEITMAN, KENNETH WEBER, and

22 CAITLIN PANOV

FEDERAL COURT PROOF OF SERVICE
LOPEZ, ANTONIO, et al. v. CITY OF ANAHEIM, et al.
Case No. 8:22-cv-1351

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to the action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, CA 90071. I am employed in the office of a member of the bar of this Court at whose direction the service was made.

On May 8, 2024, I served the following document(s): DEFENDANTS' OPPOSITION TO PLAINTIFFS' EX PARTE MOTION TO MODIFY THE SCHEDULING ORDER

I served the documents on the following persons at the following addresses (including fax numbers and e-mail addresses, if applicable):

SEE ATTACHED SERVICE LIST

The documents were served by the following means:

(BY COURT'S CM/ECF SYSTEM) Pursuant to Local Rule, I electronically filed the documents with the Clerk of the Court using the CM/ECF system, which sent notification of that filing to the persons listed above.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed on May 8, 2024, at Los Angeles, California.

/s/ Abigail J. R. McLaughlin
Abigail J. R. McLaughlin

1 **SERVICE LIST**
2 **LOPEZ, ANTONIO, et al. v. CITY OF ANAHEIM, et al.**
3 **Case No. 8:22-cv-1351**

4 BURRIS, NISENBAUM, CURRY & **ATTORNEYS FOR PLAINTIFFS:**
5 **LACY LLP** Antonio Lopez, Johanna Lopez, & S.L. by
6 JOHN L. BURRIS, Esq. (SBN 69888) and through his guardian ad litem
7 Airport Corporate Centre Rocio Flores
8 7677 Oakport Street, Suite 1120
9 Oakland, California 94621
10 Telephone: (510) 839-5200
11 Facsimile: (510) 839-3882
12 john.burris@johnburrislaw.com

13 **ATTORNEYS FOR PLAINTIFFS:**
14 BURRIS, NISENBAUM, CURRY & Antonio Lopez, Johanna Lopez, & S.L. by
15 **LACY LLP** and through his guardian ad litem
16 DEWITT M. LACY, Esq. (SBN 258789) Rocio Flores
17 JULIA N. QUESADA, Esq. (SBN
18 337872)
19 LENA P. ANDREWS, Esq. (SBN
20 342471)
21 9701 Wilshire Blvd., Suite 1000
22 Beverly Hills, California 90212
23 Telephone: (310) 601-7070
24 Facsimile: (510) 839-3882
25 dewitt@bncllaw.com
26 julia.quesada@bncllaw.com
27 lena.andrews@bncllaw.com

28 Gregg M. Gaudet, Assistant City **ATTORNEYS FOR DEFENDANTS:**
29 Attorney City of Anaheim
30 City of Anaheim
31 200 South Anaheim Boulevard, Suite
32 356
33 Anaheim, CA 92805
34 Telephone: (714) 765-5169
35 gaudet@anaheim.net
36 RFabela@anaheim.net
37 KPelletier@anaheim.net
38 MMerrill@anaheim.net
39 TMatthews@anaheim.net